IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASHLEY MCCLAIN, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 05-1117
MCDONALD'S CORP., et al., Defendants.	:	

Memorandum and Order

YOHN, J. January ___, 2007

Plaintiff Ashley McClain brings this action against her former employer, McDonald's Corp. ("McDonald's"), and its employees, Douglas Tasker, Lisa Labyack, Brian Turner, Pamela Weaver, and Mark Marino, alleging retaliation in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. Plaintiff also brings claims against defendant McDonald's for failure to pay overtime in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and the Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Cons. Stat. §§ 333.101-333.115. Further, plaintiff brings state law claims for assault and false imprisonment against defendants McDonald's, Tasker and Labyack; and claims for battery against defendants Tasker and Labyack.

Currently pending before the court is defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Defendants argue that summary judgment should be entered on all of plaintiff's claims as a matter of law. Plaintiff opposes defendants' motion for

summary judgment except with regard to the assault claim.[1] Further, plaintiff argues summary judgment is inappropriate pursuant to Federal Rule of Civil Procedure 56(f). For the foregoing reasons, I will grant defendants' motion in part and deny it in part.

I. Background[2]

On April 23, 2002, McDonald's hired plaintiff as a shift manager. (Pl.'s Dep. I 9:15-17, 14:22-15:6, Sept. 14, 2005.) Approximately in October of 2003, plaintiff was promoted to first assistant manager[3] for the McDonald's restaurant located at 1240 Bristol Pike, Bensalem, Bucks

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[1]"Plaintiff concedes that summary judgment on the assault count is appropriate." (Pl.'s Mem. in Opp'n to Mot. Summ. J. 7.) Therefore, I will grant defendants' motion for summary judgment on the assault claim without further discussion.

[2]The account contained in this section is comprised of both undisputed facts and plaintiff's factual allegations. *See Skoczylas v. Atlantic Credit & Fin., Inc.*, 2002 U.S. Dist. LEXIS 429, at *5 (E.D. Pa. Jan. 15, 2002) ("When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party."); *see also Brown v. Muhlenberg Twp.*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)).

[3]As first assistant manager, plaintiff received training from McDonald's, including, among other things, basic shift management training and food safety certification. (Pl.'s Dep. I 189:11-16.) Defendant Tasker received similar training. (*Id*.) Plaintiff's duties included: interviewing and hiring new employees without consulting her superiors (*id*. at 157:9-23); disciplining employees (*id*. at 157:24-25); suspending and firing employees (*id*. at 159:11-13, 160:9-10); recommending employees for promotion (*id*. at 159:17-20); managing a shift consisting of more than two subordinate employees (*id*. at 153:6-9); distributing and assigning work to the other employees (*id*. at 174: 3-53); acting as store manager while Tasker was on leave (*id*. at 160:16-19, 210:2-7); making scheduling decisions (*id*. at 153:10); training employees, including low-level managers (*id*. at 160:20-163:15, 168:6-169:3); addressing employee and customer complaints (*id*. at 165:23-166:23, 169:4-171:13); and preparing the restaurant for inspections (*id*. at 205:7-207:13). Plaintiff also spent at least fifteen hours per week at home working on fulfilling her scheduling and payroll responsibilities. (*Id*. at 195:25-196:4; Pl.'s Dep. II 83:12-19, Jan. 19, 2006.) While plaintiff performed other non-management functions as well (75% of her work-shift), she testified that management was her primary function. (Pl.'s Dep. I 156:10-23; Pl.'s Dep. II 212:17-214:11.) In addition, as first assistant manager, plaintiff was the second-highest ranking employee at the McDonald's restaurant (Pl.'s Dep. I 150:3-9), and entitled to enroll in the McDonald's Management Cash Incentive Bonus

County, Pennsylvania ("Woodhaven McDonald's"). (*Id*. at 17:19-21.) During her employment, plaintiff reported to Tasker, the store manager of the Woodhaven McDonald's, and Labyack, an operations consultant. (*Id*. at 30:20-22, 53:8-12, 65:19-21.) Labyack reported to Weaver, the operations manager. (*Id*.) Weaver reported to Marino, McDonald's Director of Human Resources for the Philadelphia region. (Pl.'s Dep. II 23:12-24:1, Jan. 19, 2006.) Turner, a swing manager at the Woodhaven McDonald's, was plaintiff's subordinate. (Pl.'s Dep. I 77:15-18.) At the time McDonald's terminated plaintiff's employment her salary was $32,500.00. (Reilly Decl. Ex. D.)[4]

In July of 2004, plaintiff requested leave after discovering her father had cancer. (Pl.'s Dep. I 28:15-25, 29:2-3.) Labyack granted plaintiff's request for leave, which amounted to two weeks. (*Id*. at 31:7-13.) Plaintiff was not paid while on leave.[5] (*Id*. at 32:5-14.) On July 21, 2004, while still on leave, plaintiff interviewed at Burger King for an assistant manager position.[6]

Plan (non-salary employees are ineligible for this plan). (*Id*. at 190:7-191:19.)

[4]In her opposition to defendants' statement of undisputed facts, plaintiff now, without proffering any supporting evidence, denies receiving annual salary and asserts that she earned $13.89 per hour. (Pl.'s Opp'n to Def.'s Undisputed Facts ¶ 9.) However, it is clear from plaintiff's initial disclosures with regard to damages that she claimed to earn a salary of $32,500 (approximately $625 per week). (Reilly Decl. Ex. D; *see also* Pl.'s Dep. I 147:19-149:201, 190:7-9.) In her initial disclosures, plaintiff approximated that her salary of $32,500 equaled earning $13.89 per hour. (Reilly Decl. Ex. D.) Plaintiff offers no explanation for the discrepancy between her opposition to defendants' statement of undisputed facts and her initial disclosures.

[5]Plaintiff understood that McDonald's was not required to pay her while she was on family medical leave. (Pl.'s Dep. I 138:23-139:3.) McDonald's accidently sent plaintiff paychecks while she was on leave in July of 2004. Plaintiff paid back the amount of those paychecks. (*Id*. at 32:5-12.)

[6]Plaintiff maintained a calender ("plaintiff's calender") on which an interview with Burger King was scheduled for July 21, 2004. (Pl.'s Dep. II 44:15-46:22.)

(Pl.'s Dep. II 45:24-46:17.) Upon returning to work in late July of 2004, plaintiff informed Tasker that her father was scheduled to undergo chemotherapy on Mondays. (*Id*. at 49:18-22.) As a result, beginning on August 2, 2004, McDonald's adjusted plaintiff's schedule so that she would not have to work on Mondays. (*Id*. at 51:3-6.) On October 2, 2004, plaintiff submitted her two-weeks notice of resignation because of the amount of hours required of managers on salary and the way Tasker was treating Mark Brock, another manager. (*Id*. at 27:12-23, 30:2-21.) Plaintiff rescinded the notice of resignation after meeting with defendants Labyack and Tasker, who convinced plaintiff to remain at McDonald's. (*Id*. at 38:2-23, 42:12-20, 43:5-6.) However, plaintiff scheduled another job interview for October 27, 2004. (*Id*. at 64:15-65:2.)

On October 18, 2004, plaintiff's father told her that he was scheduled to undergo surgery for a stent operation in eleven days, on October 29, 2004.[7] (*Id*. at 80:15-19.) Later that day, plaintiff orally informed Tasker that she needed to take indefinite leave starting on October 29, 2004 because she needed to get her life in order and her father was scheduled to undergo surgery.[8] (Pl.'s Dep. I 37:19-23, 39:19-25, 40:2-3, 43:12-16; Pl.'s Dep. II 79:10-23, 107:16-24.)

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[7]At her depositions, plaintiff testified that her father, Willis McClain, underwent a stent implantation on October 29, 2004. (Pl.'s Dep. I 36:16-24, 42:2-3; Pl.'s Dep. II 80:15-81:3.) Contrary to her testimony, plaintiff now admits that Willis McClain underwent a stent implantation in July of 2004, but was never scheduled for a stent implantation or had another stent implanted thereafter. (Def.'s Undisputed Facts ¶¶ 24, 30; Pl.'s Opp'n to Def.'s Undisputed Facts ¶¶ 24, 30; Pl.'s Aff. ¶¶ 19, 21.) Willis McClain testified that he is adamantly against surgeries and therefore would not have agreed to a second stent implantation. (Willis McClain Dep. 50:19-51:9.) There is no indication in his medical records that a stent implantation was required or suggested by a physician. (Reilly Decl. Ex. H.) Further, although plaintiff admits that her calender would reflect the date of her father's surgery, there is no mention of the surgery in the month of October. (Pl.'s Dep. I 71:14-16.)

[8]Plaintiff did not complete a Notification for Leave of Absence form and submit it to Labyack as required by McDonald's procedures for taking leave because plaintiff was not required to do so when she previously requested and took leave in July of 2004. (Pl.'s Aff. ¶ 23;

From October 18, 2004 to October 29, 2004, plaintiff did not speak to Tasker again about taking leave. (Pl.'s Dep. II 81:4-10.) Other than Tasker's remark that plaintiff did not have to take leave every time she had a tribulation in her life (*id*. at 79:10-80:3), plaintiff was never discouraged from taking leave (*id*. at 87:2-8). Plaintiff's October 18, 2004 request for leave was neither denied nor granted. (Pl.'s Dep. I 43:22-44:15; Pl.'s Dep. II 86:24-87:12.)

On October 29, 2004, although she was scheduled to work, plaintiff called the Woodhaven McDonald's and stated that she would not be reporting to work due to her request for leave of absence. (Def.'s Undisputed Facts ¶ 31; Pl.'s Opp'n to Def.'s Undisputed Facts ¶ 31.) Thereafter, on the same day, plaintiff called the restaurant again and expressed to Turner her dissatisfaction with her employment at McDonald's. (Def.'s Undisputed Facts ¶ 32; Pl.'s Opp'n to Def.'s Undisputed Facts ¶ 32.) Plaintiff was told that someone would return her phone call. Later in the day, Labyack, who had no prior knowledge of plaintiff's request for leave, called plaintiff and directed her to report to work. (Pl.'s Dep. I 61:7-22.) In light of plaintiff's failure to report for her shift, McDonald's initiated an investigation into plaintiff's absence. (Def.'s Undisputed Facts ¶ 33; Pl.'s Opp'n to Def.'s Undisputed Facts ¶ 33.) As part of the investigation, Tasker and Labyack scheduled a meeting with plaintiff for November 8, 2004, at the McDonald's restaurant located at 7613 Castor Avenue, Philadelphia, Pennsylvania ("Castor McDonald's").[9] (Pl.'s Dep. I 48:17-49:20.)

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see also Weaver Decl. Ex. 2.)

[9]Defendants left a message on plaintiff's voice-mail informing her about the meeting at the Castor McDonald's. (Pl.'s Dep. I 50:22-24.) Plaintiff claims that she did not have any contact with defendants prior to receiving this voice-mail because she was in the hospital with her father. (*Id*. at 51:17-24.)

On the morning of November 8, 2004, plaintiff met with Tasker and Labyack in the public-seating area of the Castor McDonald's. (*Id*. at 52:11-22, 53:5-7.) When Tasker and Labyack asked why plaintiff had taken leave, plaintiff answered that her father had undergone surgery and that she needed to be there with him because the doctors did not know how much longer he would live. (*Id*. at 54:5-14); *see supra* Part.I n.4. Labyack then handed plaintiff a blank piece of paper and directed her to write down her reason for taking personal leave. (Pl.'s Dep. I 66:11-14.) After plaintiff refused to do so, Labyack told plaintiff to take the rest of the day off and that she would be contacted the next day. (*Id*. at 66:21-57:5.) Plaintiff then went home. (*Id*. at 70:2-4.) However, shortly thereafter, plaintiff arrived at the Woodhaven McDonald's even though she was not scheduled to manage a shift at any time on November 8, 2004. (*Id*. at 72:11-15, 84:12-85:4.) Upon arriving, Turner informed her that she was not supposed to be at work.[10] (*Id*. at 77:7-16.) Plaintiff then called Tasker, who verified that plaintiff was not to manage a shift on that day. (*Id*. at 85:19-23.) After speaking with Tasker, plaintiff left the Woodhaven McDonald's. (*Id*. at 96:22-25.)

Later on the same day, plaintiff returned to the Woodhaven McDonald's around 4 p.m. and attempted to attend a managers' meeting.[11] (*Id*. at 97:5-9.) Upon arriving, Tasker approached plaintiff and informed her that she was being placed on administrative leave without pay. (*Id*. at 106:18-20.) Tasker then instructed her to leave the premises (*id*. at 100:21-25), to which plaintiff responded, "No, I'm not going anywhere" (*id*. at 101:5-7). Even after Tasker

[10]Plaintiff testified that Turner was called by Tasker and informed that plaintiff was not permitted on McDonald's property. (Pl.'s Dep. I 79:8-17.)

[11]Plaintiff testified that she ran managers' meetings in the past. (Pl.'s Dep. I 98:11-24.)

warned plaintiff that he would call the police, plaintiff refused to leave. (*Id*. at 101:13-25.) Shortly thereafter, while plaintiff called Labyack to find out why she was being placed on administrative leave, Tasker called the police. (*Id*. at 102:14-104:5.) At that time, Tasker and Labyack did not give plaintiff an answer as to why she was being placed on administrative leave. (*Id*. at 107:5-12.) As the police arrived, plaintiff left the Woodhaven McDonald's. (*Id*. at 104:20-23.) After leaving the restaurant, plaintiff contacted Weaver. (*Id*. at 110:4-22.) Weaver informed plaintiff that she did not know why plaintiff was being placed on administrative leave, but she would call plaintiff after she knew more about the situation. (*Id*. 110:25-111:13.)

Within five days thereafter, Tasker left a message on plaintiff's voice-mail instructing her to meet with Labyack and him on November 15, 2004, at the Castor McDonald's. On November 15, 2004, plaintiff, Tasker and Labyack met in the Castor McDonald's crew room, located at the back of the restaurant. (*Id*. at 115:24-117:2.) Plaintiff's father came with plaintiff to the Castor McDonald's, but waited at the front of the restaurant. (*Id*. at 118:20-22.) Labyack handed plaintiff two documents and instructed her to read them. (*Id*. at 117:18-118:8.) The documents stated that plaintiff was unfit to manage a shift, and that plaintiff's work and attitude were poor. (*Id*. at 3-8.) The documents also asked for her resignation. (*Id*. at 118:7-8.) Plaintiff refused to sign the documents. (*Id*. at 120:7-14.) With papers in hand, plaintiff then attempted to leave the room in order to show the documents to her father and make copies for her own records. (*Id*. at 118:20-22.) At that moment, Labyack and Tasker blocked plaintiff from exiting the crew room. (*Id*. at 118:23-24.) In doing so, Labyack's arm "bumped" plaintiff's elbow, but caused no injury. (*Id*. at 118:24-25, 123:22-25.) Labyack then confiscated the two documents and told plaintiff that if she did not sign the documents she would no longer be an employee of McDonald's. (*Id*.

at 119:2-8.) During this time, plaintiff never requested to leave the crew room nor did defendants state that she was prohibited from leaving. (*Id*. at 130:2-8.) Plaintiff also called Weaver but was unable to reach her. (*Id*. at 135:8-12.) Tasker and Labyack never attempted to prevent plaintiff from calling Weaver. (*Id*.) After the documents were confiscated, plaintiff left the room. (*Id*. at 131:21-22.) Plaintiff returned to the room when Labyack made a second request for plaintiff to submit her resignation by signing the documents. (*Id*. at 131:25-132:13.) After plaintiff again refused, Labyack informed plaintiff that she was no longer a McDonald's employee and was therefore trespassing. (*Id*. at 132:20-21, 143:18-25.) After another McDonald's employee called the police, plaintiff left the Woodhaven McDonald's.[12] (*Id*. at 143:10-11.)

Plaintiff believes that her employment at McDonald's was terminated by defendants for several reasons:

> I was not going along with Douglas Tasker's plan on basically trying to sabotage Mark and I was not, as his first assistant, he felt that I should have been on his side and agree with everything he said or everything that was passed down by Lisa Labyack and didn't agree on some of the things that was passed down by Lisa Labyack or by himself . . . . And more likely because of the amount of hours that we had to put in and the fact that I was complaining to him and Lisa Labyack about me having to work over my 50 scheduled hours a week.

(Pl.'s Dep. II 82:10-24.) Plaintiff testified that she does not believe there are any other reasons as

[12]Plaintiff testified that she did not call the police to file a complaint with regard to Labyack's "bumping" of her elbow and defendants Tasker and Labyack's preventing her from leaving the crew room. (Pl.'s Dep. I 145:8-24.)

to why she was terminated.[13] (*Id*. at 83:20-23.) On March 9, 2005, plaintiff filed suit against defendants alleging retaliation in violation of the FMLA, failure to pay overtime in violation of the FLSA and the PMWA, assault, battery, and false imprisonment. Defendants have filed a motion for summary judgment as to all claims.

II. Legal Standards

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The non-movant must present concrete evidence supporting each essential element of its claim. *Celotex*, 477 U.S. at 322-23.

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

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[13]Contrary to her deposition testimony (Pl.'s Dep. II 82:10-24), plaintiff now asserts, through an affidavit, that she believes her termination resulted from her request for leave on October 18, 2004 (Pl.'s Aff. ¶ 28).

Furthermore, "[a]ll justifiable inferences are to be drawn in [the non-movant's] favor." *Id*. "Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

III. Discussion

Defendants move for summary judgment as to all of plaintiff's claims. For the reasons that follow, I will grant defendants' motion as to plaintiff's claim for retaliation under the FMLA, claims for overtime under the FLSA and PMWA, claim for false imprisonment against McDonald's, and claim for battery against Tasker.[14] Likewise, defendants' motion will be granted as to plaintiff's assault claims against McDonald's, Tasker, and Labyack by agreement. However, I will deny defendants' motion as to plaintiff's false imprisonment claim against Tasker and Labyack, and battery claim against Labyack. Finally, I conclude that summary judgment is not precluded by Rule 56(f).

[14]Turner, Weaver and Marino are listed in the caption as defendants but plaintiff, in both her complaint and brief, makes no allegations as to their conduct or argument with reference to any liability against them. As such, summary judgment will be granted as to these defendants.

A. FMLA Retaliation Claim[15]

To establish a *prima facie* case of retaliation under the FMLA, plaintiff must show that: (1) she engaged in a statutorily protected activity, (2) she suffered an adverse employment action, and (3) a causal connection exists between the adverse employment action and plaintiff's exercise of her rights under the FMLA. *See Roosevelt Rhym v. SEPTA*, 2006 U.S. Dist. LEXIS 49524, at *12 (E.D. Pa. July 19, 2006); *Bearley v. Friendly Ice Cream Corp.*, 322 F. Supp. 2d 563, 571 (M.D. Pa. 2004). If plaintiff establishes a *prima facie* case for retaliation, the burden shifts, and defendants must state a legitimate non-retaliatory reason for the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006) (applying *McDonnell Douglas*, 411 U.S. at 802-04, to plaintiff's FMLA retaliation claim); *Yashenko v. Harrah's N.C. Casino Co., LLC*, 446 F.3d 541, 551 (4th Cir. 2006). Once defendants state a legitimate non-retaliatory reason for the adverse employment action, the burden shifts again, and plaintiff must demonstrate that defendants' proffered reason is a pretext for FMLA retaliation. *See Yashenko*, 446 F.3d at 551; *see also Edgar v. JAC Prods.*, 443 F.3d 501, 508 (6th Cir. 2006). To show pretext, "the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence . . . .'"

[15]In her memorandum in opposition to defendants' motion for summary judgment, plaintiff appears to assert a claim for interference under the FMLA. (Pl.'s Mem. in Opp'n to Mot. Summ. J. 3-6.) The allegations in the complaint do not support an interference claim, and the parties, up to this point, have litigated the case under the premise that plaintiff only asserted a retaliation claim under the FMLA. (*See* Pl.'s Compl. ¶¶ 11-27.) Therefore, plaintiff's argument with regard to interference under the FMLA will be disregarded.

Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (citing and quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992)). Defendants assert that they are entitled to summary judgment as to plaintiff's FMLA retaliation claim for two reasons: (1) plaintiff was not engaged in a statutorily protected activity and (2) plaintiff cannot show that defendants' non-retaliatory reason for the adverse employment action is pretextual. (Def.'s Mem. in Supp. of Mot. Summ. J. 5, 8.)

Defendants claim that they are entitled to summary judgment because plaintiff cannot show that she was engaged in a statutorily protected activity. Defendants argue, citing *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005), and *Loomis v. Honda of America Manufacturing, Inc.*, 2003 U.S. Dist. LEXIS 26797 (S.D. Ohio Jan. 6, 2003), that "plaintiff cannot make a *prima facie* case of retaliation because the FMLA does not protect employees who create fictional reasons for taking leave." (Def.'s Mem. in Supp. of Mot. Summ. J. 6.) Defendants assert that plaintiff's reason for taking leave, her father's surgery on October 29, 2004, never occurred and therefore she was not engaged in a statutorily protected activity. I agree.

Both *Tellis* and *Loomis* are helpful in the instant action. In *Tellis*, plaintiff requested leave to care for his wife who was having difficulties with pregnancy. *Tellis*, 414 F.3d at 1046. Rather than caring for his wife, plaintiff went on a cross-country trip to retrieve a family vehicle. *Id*. The Ninth Circuit, affirming the district court's grant of summary judgment, agreed with the district court's conclusion that plaintiff "breached" his leave by not caring for his wife. *Id*. (holding "that as a matter of law, providing care to a family member under the FMLA requires some actual care[,] which did not occur here"). In *Loomis*, plaintiff, after returning from leave,

altered a medical form to indicate falsely that she had a serious health condition. *Loomis*, 2003 U.S. Dist. LEXIS 26797, at *6. The defendant in *Loomis* approved FMLA leave based on the altered form. *Id*. (stating "[p]laintiff would not have been approved for FMLA leave based on the unaltered form"). Plaintiff was terminated for misrepresenting facts concerning her leave request. *Id*. at *8. In ruling on cross-motions for summary judgment, the district court concluded that "[p]laintiff did not avail herself of a protected FMLA right because she submitted a falsified . . . form." *Id*. at *16. The district court rejected plaintiff's argument that the altered form is irrelevant because defendant did not discover the alteration until her deposition. *Id*. ("The proper focus is on the [p]laintiff's act and not [the] timing of [d]efendant's knowledge of the falsification.") Similar to the plaintiffs in *Tellis* and *Loomis*, I conclude that plaintiff in the instant action was not engaged in a statutorily protected activity.

The relevant undisputed facts show that plaintiff was not engaged in a statutorily protected activity. Plaintiff told Tasker that she needed to take leave beginning on October 29, 2004 because her father was scheduled to undergo surgery on that date. More specifically, he was scheduled to have a stent implanted. At her deposition, plaintiff testified that her father did in fact have a stent implanted on October 29, 2004, and that she was with him at the hospital for most of the time she was absent from work. Plaintiff now admits that her father did not undergo any surgery in the month of October of 2004.[16] (Pl.'s Aff. ¶¶ 19, 21.) Further, plaintiff's father

[16]Plaintiff, through an affidavit, claims that her father visited the hospital on October 26, 2004 for chemotherapy, and November 2, 2004 for diagnostic scans. (Pl.'s Aff. ¶ 19.) Importantly, plaintiff does not claim that she or her father visited the hospital on any date between October 26, 2004 and November 2, 2004. (*Id*.) This contradicts her deposition testimony that she was in the hospital for the majority of the time she was on leave. Further, although plaintiff claims in her affidavit that she attended medical appointments with her father, she does not proffer any dates or supporting evidence. (*Id*. at ¶ 21.)

testified, consistent with his medical records, that he did not have surgery at any time after July of 2004. Plaintiff presents no evidence to place the material facts at issue. Plaintiff only asserts that, when she spoke to Tasker on October 18, 2004, she believed her father was scheduled for a stent implantation on October 29, 2004 because he had told her so. While this may explain her statement to Tasker on October 18, 2004, it does not explain why she did not call Tasker on October 29, 2004 or earlier when she learned there would be no surgery, plaintiff's statement to Tasker and Labyack on November 8, 2004 that her father had undergone the surgery, and plaintiff's deposition testimony, which was taken on September 14, 2005, that her father had a stent implanted on October 29, 2004. (Pl.'s Dep. I 42:2-3.) Regardless of whether plaintiff had a mistaken belief on October 18, 2004, the parties agree that plaintiff's father did not have surgery on October 29, 2004, she did not advise McDonald's of this when she learned of it at least by October 25, 2004, and she still claimed that he did have the surgery when she spoke to management on November 8, 2004 and again when her deposition was taken a year later. Therefore, I conclude that a reasonable jury could not find that plaintiff was engaged in a statutorily protected activity: attending her father's stent implantation and caring for him thereafter.

Even if this court were to conclude that plaintiff was engaged in a statutorily protected activity, defendants are nevertheless entitled to summary judgment as to plaintiff's retaliation claim because a reasonable jury could not find that defendants' non-retaliatory reasons for the adverse employment action are a pretext for FMLA retaliation. Defendants assert that plaintiff's employment was terminated because "she failed to report to work for several days and engaged in egregious workplace misconduct including multiple acts of insubordination, repeated use of

foul language, and destruction of company property." (Def.'s Mem. in Supp. of Mot. Summ. J. 8; Weaver Decl. Ex. 2.) When asked what she believed the reasons were for her termination, plaintiff responded:

> I was not going along with Douglas Tasker's plan on basically trying to sabotage Mark and I was not, as his first assistant, he felt that I should have been on his side and agree with everything he said or everything that was passed down by Lisa Labyack and didn't agree on some of the things that was passed down by Lisa Labyack or by himself . . . . And more likely because of the amount of hours that we had to put in and the fact that I was complaining to him and Lisa Labyack about me having to work over my 50 scheduled hours a week.

(Pl.'s Dep. II 82:10-24.) Plaintiff testified that she does not believe that she was terminated for any other additional reasons. (*Id*. at 83:20-23.) Plaintiff's proffered reasons at her deposition, even if accepted as true, are not protected under the FMLA. Further, they negate her claim that she was fired for taking leave under the FMLA.

Plaintiff now submits an affidavit with her memorandum in opposition to defendants' motion for summary judgment asserting that she additionally believes her termination resulted from her request for leave on October 18, 2004. (Pl.'s Aff. ¶ 28.) However, under the sham affidavit doctrine, this court will disregard plaintiff's bald assertion. The Third Circuit recognizes the sham affidavit doctrine, "which generally 'refers to the trial courts' practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony.'" *In re Citx Corp.*, 448 F.3d 672, 679 (3d Cir. 2006) (quoting *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004)). "When a party does not explain the contradiction between the subsequent affidavit and the prior deposition, the alleged factual issue in dispute can be perceived as a 'sham,' thereby not

creating an impediment to a grant of summary judgment based on the deposition." *Baer*, 392 F.3d at 624. In the instant action, plaintiff attempts to raise a genuine issue of material fact by submitting an affidavit which contradicts her sworn testimony. (*Compare* Pl.'s Dep. II 82:10-24, 83:20-23, *with* Pl.'s Aff. ¶ 28.) Further, plaintiff does not provide any explanation for this contradiction. As such, I will disregard the parts of plaintiff's affidavit that contradict her deposition. *See Baer*, 392 F.3d at 624. Therefore, even if this court were to conclude that plaintiff was engaged in a statutorily protected activity, I conclude that a reasonable jury could not find that plaintiff is able show that defendants' non-retaliatory reasons for the adverse action are a pretext for FMLA retaliation.

B. FLSA & PMWA Claims for Overtime Pay

1. FLSA Claim

McDonald's asserts that it is entitled to summary judgment as to plaintiff's claim for overtime pay under the FLSA because plaintiff falls within the FLSA executive exemption under the old and new regulations.[17] I agree. Under the FLSA, an employer must pay an employee who works overtime (any time worked beyond forty hours per week) at a rate of one-and-a-half times their regular rate of pay. 29 U.S.C. § 207. Employees acting in a bona fide executive capacity are exempted from this requirement. 29 U.S.C. § 213(a)(1). An employer bears the burden of proving that the employee is "employed in a bona fide executive . . . capacity" and therefore falls within the exemption. 29 U.S.C. § 213(a); *see Reich v. Gateway Press*, 13 F.3d

[17]The new regulations, which became effective on August 23, 2004, altered the analysis in determining whether employees fall within the executive exemption. *See* 29 C.F.R. § 541.100. Both the old and new regulations are applicable to plaintiff's claims because she alleges to have worked overtime from approximately October of 2003 to November of 2004. *See Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 557 n.2 (3d Cir. 2006).

685, 694 n.11 (3d Cir. 1994) (citing *Idaho Street Metal Workers, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966)).

The old regulations apply to plaintiff's overtime claim for work performed prior to August 23, 2004. Where an employee earns more than $250 per week, the "short test" is applicable for determining whether an employee falls within the exemption. Former 29 C.F.R. § 541.1(f); *see also Shockley v. City of Newport News*, 997 F.2d 18, 25 (4th Cir. 1993). Under the short test, an employer must show: (1) the employee is compensated on a salary basis; (2) the employee's primary duty is management; and (3) the employee regularly directs the work of two or more employees. *See McGrath v. City of Philadelphia*, 864 F. Supp. 466, 484 (E.D. Pa. 1994) (citing *Guthrie v. Lady Jane Collieries. Inc.*, 722 F.2d 1141, 1143 (3d Cir. 1983)). "Management" includes, but is not limited to, "selecting[] and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; planning the work; determining the techniques to be used; and, apportioning the work among the workers." *Goldman v. Radioshack Corp.*, 2006 U.S. Dist. LEXIS 2433, at *6 (E.D. Pa. Jan. 24, 2006) (citing former 29 C.F.R. § 541.102(b)). The Third Circuit has stated:

> [A]s a "general rule of thumb," primary duty means a duty at which an employee spends the major part, or over 50% of his or her time. Of course, time is not the sole factor to consider. Other factors include the importance of the duties when compared to other types of duties, the frequency with which the employee exercises discretionary powers, freedom from supervision, and pay relative to other employees.

Reich, 13 F.3d at 699 (citing former 29 C.F.R. § 541.103). Thus, "in situations where the employee does not spend over 50[%] of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion."

Guthrie, 722 F.2d at 1144 (quoting former 29 C.F.R. § 541.103).

The undisputed facts show that plaintiff falls within the executive exception under the old regulations. In the instant action, plaintiff only appears to challenge McDonald's argument as to step two, the primary duty requirement, of the "short test." (*See* Pl.'s Mem. in Opp'n to Mot. Summ. J. 6.) It is undisputed that plaintiff earned a salary exceeding $250 per week. (Reilly Decl. Ex. D); *see supra* Part I n.4. In addition, plaintiff testified that she regularly supervised four to five employees, and at least two employees in any given shift. (Pl.'s Dep. I 150:22-153:9.) Thus, the first and third requirements of the "short test" are satisfied.

With regard to the primary duty requirement, McDonald's asserts that plaintiff's testimony demonstrates that there is no genuine issue of material fact as to whether plaintiff's primary duty was managerial. *See supra* Part I n.3. Plaintiff testified that as first assistant manager, her duties included interviewing and hiring new employees without consulting her superiors (Pl.'s Dep. I 157:9-23); disciplining employees (*id*. at 157:24-25); suspending and firing employees (*id*. at 159:11-13, 160:9-10); recommending employees for promotion (*id*. at 159:17-20); distributing and assigning work to the other employees (*id*. at 174:3-53); acting as store manager while Tasker was on leave (*id*. at 160:16-19, 210:2-7); making scheduling decisions (*id*. at 153:10); training employees, including low-level managers (*id*. at 160:20-163:15, 168:6-169:3); addressing employee and customer complaints (*id*. at 165:23-166:23, 169:4-171:13); and preparing the restaurant for inspections (*id*. at 205:7-207:13). All of these responsibilities are clearly managerial duties. Plaintiff argues that because 75% of her shifts consisted of non-exempt service, leaving only 25% to be devoted to managerial duties, her primary duty was not managerial. (Pl.'s Mem. in Opp'n to Mot. Summ. J. 6.) Second, plaintiff

argues, citing *McGrath*, 864 F. Supp. at 489, that the amount of time an employee devoted to managerial duties is a factual question for the jury. (*Id*.)

This court rejects plaintiff's arguments. As noted above, "in situations where the employee does not spend over 50[%] of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion." *Guthrie*, 722 F.2d at 1144 (quoting former 29 C.F.R. § 541.103). Plaintiff's allegation that she performed non-managerial functions during 75% of her shifts is misleading. That calculation is based solely on her work-shift at McDonald's. Plaintiff testified that she also spent at least fifteen hours per week performing managerial duties–fulfilling her scheduling and payroll responsibilities–at home. (Pl.'s Dep. I 195:25-196:4; Pl.'s Dep. II 83:12-19.) If plaintiff's work at home is taken into account, she performed non-managerial functions approximately 58% of her time working for McDonald's. Further, plaintiff's testimony overwhelming supports the conclusion that management was her primary function. In fact, plaintiff testified that her managerial duties were of highest priority during her shifts. (Pl.'s Dep. I 156:10-23; Pl.'s Dep. II 212:17-214:11.) Plaintiff's second argument, that the amount of time an employee devoted to managerial duties is a factual question for the jury, is also with merit. This court is not making a finding of fact as to the amount of time plaintiff devoted to managerial duties. Rather, this court is accepting plaintiff's testimony–that she devoted 75% of her time to non-managerial duties while at work and 100% of her time to managerial duties while at home–as true for purposes of summary judgment. (Pl.'s Dep. I 156:14-17, 195:25-196:4; Pl.'s Dep. II 83:12-19.) As such, I conclude that a reasonable jury could not find that plaintiff falls outside the executive exception under the old regulations.

Under the new regulations, which apply to plaintiff's overtime claim for work performed from August 23, 2004 to November 15, 2004, an employee who falls within the executive exception is defined as any employee:

> (1) Compensated on a salary basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities;
> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> (3) Who customarily and regularly directs the work of two or more other employees; and
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100; *see also Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 557 (3d Cir. 2006). It is undisputed that plaintiff was on salary and paid more than $455 per week. (Reilly Decl. Ex. D); *see supra* Part I.n.4. As concluded above, plaintiff's primary duty was management. Further, plaintiff testified that she regularly supervised four to five employees, and at least two employees in any given shift (Pl.'s Dep. I 150:22-153:9); interviewed and hired new employees without consulting her superiors (*id*. at 157:9-23); disciplined employees (*id*. at 157:24-25); suspended and fired employees (*id*. at 159:11-13, 160:9-10); and recommended employees for promotion (*id*. at 159:17-20). Thus, I conclude that a reasonable jury could not find that plaintiff falls outside the executive exception under the new regulations.

Therefore, because a reasonable jury could not find that plaintiff falls outside the executive exemption under the old and new regulations, I conclude that McDonald's is entitled to summary judgment as to plaintiff's FLSA overtime claim.

2. PMWA Claim

McDonald's asserts that, just as under the FLSA, the undisputed facts demonstrate plaintiff falls within the executive exemption under the PMWA, and therefore it is entitled to summary judgment. I agree. Because the PMWA substantially parallels the old regulations under the FLSA, the court will only briefly address this claim. *See Goldman*, 2006 U.S. Dist. LEXIS 2433, at *3. Under the PMWA, employees are entitled to compensation of one-and-a-half times their regular pay rate for overtime (any time worked beyond forty hours per week). Similarly to the FLSA, employees acting in a bona fide executive capacity are exempted from this requirement under the PMWA. 43 Pa. Cons. Stat. §§ 333.105(5). Employment in an executive capacity is defined as any employee:

> (6) Who is compensated for his services on a salary basis at a rate of not less than $ 155 per week, exclusive of board, lodging or other facilities, *provided that an employee who is compensated on a salary basis at a rate of not less than $ 250 per week*, exclusive of board, lodging or other facilities, and whose *primary duty* consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the *customary and regular direction of the work of two or more other employees* therein *shall be deemed to meet all the requirements of this section*.

34 Pa. Code § 231.82(6) (emphasis added). Plaintiff does not specifically respond to McDonald's motion for summary judgment with regard to her PMWA claim. (*See* Pl.'s Mem. in Opp'n to Mot. Summ. J. 6.) For the same reasons stated in the previous subsection, *see supra* Part III.B.1, this court concludes that a reasonable jury could not find that plaintiff falls outside the executive exemption and therefore be entitled to overtime under the PMWA.

C. Battery and False Imprisonment Claims

Defendants assert that they are entitled to summary judgment as to plaintiff's battery

claim against Tasker and Labyack and false imprisonment claim against McDonald's, Tasker and Labyack because such tort claims are preempted by the exclusivity provision of the Pennsylvania Workmen's Compensation Act ("PWCA"). *See* 77 Pa. Cons. Stat. § 481(a);*see also Poyser v. Newman & Co., Inc.*, 522 A.2d 548, 550-51 (Pa. 1987) (noting that § 481(a) bars intentional tort claims against employers). Plaintiff does not respond to this assertion. Nevertheless, while I agree that the PWCA preempts the false imprisonment claim against McDonald's, I conclude that the PWCA does not preempt the false imprisonment and battery claims against defendants Labyack and Tasker.

While it is true that the exclusivity provision of the PWCA preempts intentional torts arising out of an employment relationship, the provision only applies to defendant-employers. *See Churchray v. Park Place Enter.*, 2006 U.S. Dist. LEXIS 44800, at *9 (E.D. Pa. June 30, 2006) ("The PWCA's exclusivity provision relates only to an employer's liability."); *Martin v. Lancaster Battery Co.*, 606 A.2d 444, 447 n.5 (Pa. 1992) ("The Workmen's Compensation Act does not preclude an action at common law for intentional wrongs committed by fellow employees."). "The PWCA expressly contemplates liability for co-employees whose intentional tortious conduct results in the injury of a fellow employee." *Churchray*, 2006 U.S. Dist. LEXIS 44800, at *10 (citing 77 Pa. Cons. Stat. § 72).[18] Under the PWCA, plaintiff's supervisors, defendants Labyack and Tasker, are considered co-employees. *See Churchray*, 2006 U.S. Dist. LEXIS 44800, at *9 (citing *Lentz v. Gnadden Huetten Mem'l Hosp.*, 2004 U.S. Dist. LEXIS

[18]"If disability or death is compensable under this act, a person shall not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed, except for intentional wrong." 77 Pa. Cons. Stat. § 72.

22744, at **2, 9 (E.D. Pa. Nov. 8, 2004)). Therefore, I conclude that plaintiff's false imprisonment claim against McDonald's is preempted by the PWCA. However, I conclude that the PWCA does not preempt the false imprisonment and battery claims against Tasker and Labyack.

Tasker and Labyack further argue, albeit briefly (Def.'s Mem. in Supp. of Mot. Summ. J. 19 n.11), that they are entitled to summary judgment because the undisputed facts show that plaintiff cannot make out a *prima facie* case for battery. I will grant summary judgment as to Tasker because plaintiff has proffered no evidence to support such a claim against him. As to Labyack, she asserts that plaintiff cannot show the requisite intent and damage elements. I disagree. In Pennsylvania, an "actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person . . . ." *Fritter v. Iolab Corp.*, 607 A.2d 1111, 1115 (Pa. Super. Ct. 1992) (quoting Restatement (Second) of Torts § 18). "All that is necessary is that the actor intend to cause the other, directly or indirectly, to come into contact with a foreign substance in a manner which the other would reasonably regard as offensive." *Fritter*, 607 A.2d at 1115 (quoting Restatement (Second) of Torts § 18 cmt. c). In the instant action, plaintiff can make out a *prima facie* case for battery. Plaintiff testified that Labyack "bumped" plaintiff's elbow on November 15, 2004. (Pl.'s Dep. I 118:24-25, 123:22-25.) Genuine issues of material fact exist as to whether Labyack intended to cause the contact and whether that contact would reasonably be regarded as offensive. As such, summary judgment is not appropriate as to plaintiff's battery claim against Labyack.

Therefore, because the claim for false imprisonment against McDonald's is preempted by the PWCA, I conclude summary judgment is appropriate for that claim against McDonald's.

Further, I conclude that Tasker is entitled to summary judgment as to plaintiff's battery claim. However, because genuine issues of material fact exist as to plaintiff's claims for false imprisonment against Tasker and Labyack and claim for battery against Labyack, I conclude that Tasker and Labyack are not entitled to summary judgment as to those claims.

D. Rule 56(f)

Plaintiff argues that defendants' motion for summary judgment should be denied under Federal Rule of Civil Procedure 56(f). (Pl.'s Mem. in Opp'n to Mot. Summ. J. 8.) Rule 56(f) provides:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In order to justify delaying the resolution of a motion for summary judgment, a Rule 56(f) motion must go beyond generalities and identify with specificity "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained." *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989) (quoting *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d. Cir. 1988)).

Plaintiff asserts that defendants have failed to produce documents concerning McDonald's FLSA policies and procedures and plaintiff's FMLA personnel file. Plaintiff claims that these documents will show whether plaintiff was granted or denied FMLA leave in July of 2004. Plaintiff argues that if she was granted FMLA leave in July of 2004, she was entitled to twelve weeks of leave. However, plaintiff has failed to demonstrate why the documentation she

seeks have not been previously obtained. *See Lunderstadt*, 885 F.2d at 71. She did not file a motion to compel discovery of these documents until well after discovery was closed (after two prior extensions of time) and even after defendants filed their motion for summary judgment. As a result, the court denied the motion as untimely. Therefore, this court will not refuse the application of summary judgment pursuant to Rule 56(f).

III. Conclusion

For the aforementioned reasons, defendants' motion will be denied in part and granted in part. I will deny defendants' motion for summary judgment as to plaintiff's claims of false imprisonment against defendants Tasker and Labyack, and the claim of battery against defendant Labyack. I will grant defendants' motion for summary judgment as to all remaining claims.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASHLEY MCCLAIN, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 05-1117
MCDONALD'S CORP., et al., Defendants.	:	

Order

YOHN, J.

AND NOW on this _____ day of January 2007, upon consideration of defendants' motion for summary judgment, plaintiff's response, and defendants' reply thereto, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment as to plaintiff's claims for false imprisonment against defendants Douglas Tasker and Lisa Labyack is DENIED.

2. Defendants' motion for summary judgment as to plaintiff's claim for battery against defendant Lisa Labyack is DENIED.

3. The balance of defendants motion for summary judgment is GRANTED.

4. Judgment is entered in favor of defendants McDonald's Corp., Mark Marino, Brian Turner, and Pamela Weaver and against plaintiff.

5. Judgment is entered in favor of defendants Douglas Tasker and Lisa Labyack on Count I alleging violations of the FMLA and Count IV alleging assault, and in favor of defendant Douglas Tasker only on Count V alleging battery.

6. Trial of the remaining claims is scheduled for April 3, 2007 at 10:00 AM.

s/ William H. Yohn Jr.
William H. Yohn Jr., Judge